No. 22,801

IN THE

United States Court of Appeals

For the Ninth Circuit

NEILA A. AUTENRIETH, et al.,
Plaintiffs-Appellants,

vs.

JOSEPH M. CULLEN, District Director of Internal Revenue Service, San Francisco, et al.,
Defendants-Appellees.

On Appeal from the Judgment of the United States District Court for the Northern District of California

BRIEF FOR THE APPELLEES

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STATEMENT OF THE ISSUE PRESENTED

Whether the District Court correctly dismissed an income tax refund suit, based on the claim that taxpayers, as conscientious objectors to war, are immune from taxation to the extent that tax revenue is appropriated to pay the cost of "the war in Viet-Nam."

STATEMENT OF THE CASE

Taxpayers instituted this action against the San Francisco District Director and the Commissioner of Internal Revenue to recover "such part of their respective taxes paid by them for the years 1965 and/or 1966 which is expended in support of the war effort."[1] (R. 22.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. Taxpayers appeal from the dismissal of their complaint. (R. 59-63.) The jurisdiction of this Court rests on 28 U.S.C., Section 1291.

The complaint alleged that taxpayers are conscientious objectors to war "and because of such conscientious objection they may not be compelled to contribute to the cost of the war in Viet-Nam and in further consequence, the defendants ought to be ordered to reimburse the plaintiffs and each of them such part of the taxes paid by them for the year 1965 and 1966 which represents a proportional contribution to the war effort objected to by the respective plaintiffs." (R. 19.) The Commissioner and District Director moved for dismissal of the complaint on the grounds that the court below was without jurisdiction over their persons (see footnote 1, *supra*) and the subject matter of the suit, and that the complaint

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[1]Under Section 7422(f) of the Internal Revenue Code of 1954, 26 U.S.C., Section 7422(f), tax refund suits must be brought against the United States and not particular officers of the Government. Although the complaint did not comply with Section 7422(f), the District Court treated it as if it had been "amended to name the United States of America as the proper party defendant." (R. 59.)

failed to state a claim upon which relief could be granted. (R. 26.)

Judge Zirpoli dismissed the complaint for failure to state a proper claim for relief.[2] In reaching that result, the court assumed, "without deciding, that the belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet." (R. 59.) The Court concluded that the First Amendment does not provide immunity from the income tax which is "imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live." (R. 60.)

SUMMARY OF ARGUMENT

Relying on the First Amendment's protection of freedom of religion, taxpayers contend that the income tax is unconstitutional as applied to those who conscientiously object to war, insofar as Congress may appropriate and expend tax revenue for war or in connection with the Vietnam situation. The District Court correctly held that this claim presents no basis for relief. The dismissal of the complaint was required on that ground and also because taxpayers are in substance attacking the expenditure of federal funds without standing to do so.

1. Taxpayers set out no claim for relief because they fail to show how a tax imposed on income can in

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[2]The District Court did not reach the other jurisdictional issues raised by the Government. (See R. 59.)

any way reach the Establishment or Free Exercise Clauses of the First Amendment. The Establishment Clause would be violated by a tax levied to support religious activities or institutions, but no such allegation is made in this case. The Free Exercise Clause would afford protection against a tax which burdens or regulates religious beliefs as such. For example, a license tax imposed on booksellers has been held unconstitutional as applied to religious colporteurs engaged in the distribution of religious literature. But a tax on income does not prevent or inhibit taxpayers from disseminating or holding their anti-war beliefs.

Taxpayers make the novel and fallacious argument that as a result of the statutory exemption from military service for conscientious objectors, a like exemption must, as a matter of constitutional law, be made available in respect of the income tax. To the contrary, there is no constitutional doctrine that requires Congress to enact a given exemption in respect of every statutory obligation imposed on citizens merely because it has relieved a specific class of persons from complying with one such obligation. It is one thing to compel an individual to take part physically in military service against his religious convictions and a wholly different matter to require him to do an act, such as paying taxes, which itself is not contrary to his religious beliefs and which has nothing to do with those beliefs. Congress may rationally relieve a conscientious objector from the duty of bearing arms without also relieving him of the duty to pay income taxes.

2. Taxpayers' grievance is not actually concerned with the income tax and its operation. Rather, they object to the appropriation and expenditure of federal funds in connection with Vietnam, although they do not contend that Congress is without constitutional power to legislate for that purpose. Disapproval of governmental policy—however conscientious—does not establish a First Amendment claim. Taxpayers, in failing to invoke a specific constitutional limitation on Congress' power to spend federal funds, have no standing to question the constitutionality of those expenditures under the Supreme Court's *Flast* and *Frothingham* decisions.

ARGUMENT

THE COMPLAINT WAS PROPERLY DISMISSED

A. Introduction

Like *Kalish v. United States,* pending on appeal to this Court (No. 22,886), the instant action was brought to prevent Congress from appropriating and expending tax revenues in connection with Vietnam. Taxpayers here, like the complainant in *Kalish,* do not and cannot allege that the tax in dispute is imposed on the exercise of a constitutionally protected activity in which they are now engaging or wish to engage. Compare *Murdock v. Pennsylvania,* 319 U.S. 105.[3]

[3]There, the Supreme Court held that a local license tax was unconstitutional in its application to religious colporteurs who were engaged in the distribution of religious literature, albeit accompanied by the solicitation of funds. The tax was found to burden the pursuit of a clearly religious activity.

They point to nothing either on the face of the Internal Revenue Code or in its operation that infringes their First Amendment rights to speak freely and to hold any belief. Nor do they maintain, in contrast to the complainant in *Kalish,* that Congress has exceeded its general power to expend federal funds; taxpayers (Br. 37) "emphasize, as they did in their Complaint, that neither the Trial Court nor this Court are asked to determine the legality or illegality of the Vietnam or any other war". (See, also, R. 46.) Thus, both the income tax and Congress' power to appropriate federal funds remain generally unchallenged.

Yet taxpayers' position is that the income tax is in part unconstitutional as applied to individuals who conscientiously object to the war to the extent that Congress may decide to appropriate tax revenue for war. The District Court correctly held that this contention does not represent a claim upon which relief can be granted. In addition, we submit that taxpayers have no standing even indirectly to attack the expenditure of federal funds. Dismissal of the complaint was required on each of these grounds.

B. The allegations of the complaint taken as true nevertheless fail to state a claim upon which relief can be granted

The core of taxpayers' position is that the First Amendment's protection of freedom of religion exempts from the obligations of citizenship those who conscientiously oppose governmental acts, programs or legislation. If this were a sound thesis, an individual who religiously believed in racial segregation would be free to ignore the civil rights laws; a person

who passionately believed it to be immoral to take his property by taxation only to give it away to others through welfare, anti-poverty, and foreign aid programs could justly recover or refuse to pay his taxes. Thus, as the District Court recognized (R. 60), acceptance of taxpayers' constitutional view would destroy effective government and thereby put an end to the rights of all Americans—majority and minority alike.

At all events, religious liberty under the First Amendment does not grant immunity from otherwise valid legislation merely because an individual disagrees with governmental policy. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." Obviously, taxpayers can place no reliance on the Establishment Clause. See *Everson v. Board of Education,* 330 U.S. 1, 15-16, in which Mr. Justice Black's opinion for the Court defined the scope of the prohibition against an establishment of religion:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. * * *

Taxpayers do not assert that the federal tax on income punishes them for their religious beliefs or disbeliefs; nor do they claim that the tax is levied to support religious institutions or activities. And were the income tax tangentially to offend religious convictions in some manner, it would not necessarily be unconstitutional under the test enunciated by the Supreme Court in *Abington School Dist. v. Schempp,* 374 U.S. 203, 222:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[4]

It cannot be said that the legislative purpose of the income tax or its primary effect is the advancement or inhibition of religion; it is entirely neutral on religion.

The Free Exercise Clause likewise affords no support whatever to taxpayers' constitutional theory. In *Sherbert v. Verner,* 374 U.S. 398, the Supreme Court stated (p . 402):

> The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Con-*

[4]This test was recently reiterated and applied by the Supreme Court in *Board of Education v. Allen,* decided June 10, 1968 (36 U.S. Law Week 4538, 4539), to sustain the expenditure of tax funds for books to be used by students attending private sectarian schools.

> *necticut,* 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins,* 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island,* 345 U.S. 67, nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania,* 319 U.S. 105; *Follett v. McCormick,* 321 U.S. 573; cf. *Grosjean v. American Press Co.,* 297 U.S. 233. [Emphasis in original.]

Although this enumeration of the restraints on government action may not be totally exhaustive, it indicates the limits of the Free Exercise Clause: That clause counters burdens or inhibitions on activities or groups because of belief, and it prevents attempts to compel affirmation of a repugnant belief. Thus, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion, *Abington School District v. Schempp,* 374 U.S. 203, 223 * * *." *Board of Education v. Allen,* decided June 10, 1968 (36 U.S. Law Week. 4538, 4541). In this connection, the Supreme Court in *Murdock v. Pennsylvania,* 319 U.S. 105, and *Follett v. McCormick,* 321 U.S. 573, observed that a generally imposed income tax cannot rationally have a coercive effect on religious practices or beliefs. Mr. Justice Douglas stated for the Court in *Follett v. McCormick, supra,* pp. 577-578:

> The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial

> burdens of government, including taxes on income or property. We said as much in the *Murdock* case, 319 U.S., p. 112. But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.

Certainly, taxpayers cannot maintain that the income tax is in any way concerned with "beliefs as such" or denies them the right to continue to hold and, indeed, promote any of their beliefs. See *Sherbert v. Verner, supra.*[5]

Taxpayers (Br. 29-30, 35-36) rely on *Girouard v. United States,* 328 U.S. 61, and *United States v. Seeger,* 380 U.S. 163,[6] for the view that the statutory exemption from military service for conscientious objectors, although it may not be constitutionally required, must now be applied to the payment of

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[5]Even if a statute imposes an indirect burden on the free exercise of religion, which is not the case here, the statute will be sustained so long as it was enacted for the purpose and with the effect of pursuing a valid secular objective. *Braunfeld v. Brown,* 366 U.S. 599; *Gallagher v. Crown Kosher Super Market,* 366 U.S. 617 (Sunday closing laws held valid as against the free exercise claims of Orthodox Jews who were compelled by religious convictions also to close their businesses on Saturdays).

[6]In *Girouard,* it was held that an alien who refused to bear arms because of religious scruples could not be denied citizenship. The issue was one of statutory construction and not a constitutional question. In the *Seeger* case, the Supreme Court read the statutory exemption from military service for conscientious objectors to include those who did not believe in the traditional religious concept of a Supreme Being, but whose conscientious objection was equally intense.

income taxes in order to avoid improper discrimination among categories of conscientious objectors. This constitutes an entirely novel notion that, if Congress defines an exempt class for one purpose, it becomes constitutionally bound to provide the same exempt status for every purpose or as to every statute. However, that proposition is neither realistic nor legally sound. It is one thing to compel a person to take part physically in combat or to wear a military uniform against his religious convictions and an entirely different matter to have him support his government in all all of its operations through the neutral act of paying taxes.[7] Therefore Congress effects no invidious or arbitrary discrimination when it relieves a conscientious objector from bearing arms and requires others, whose consciences are likewise offended by the conduct of war, to meet all other obligations of citizenship including the payment of taxes. See *Williamson v. Lee Optical Co.,* 348 U.S. 483.

The distinction was made quite clear in the *Girouard* case (328 U.S. pp. 66-67):

> This respect by Congress over the years for the conscience of those having religious scruples against bearing arms is cogent evidence of the meaning of the [naturalization] oath. *It is recognition by Congress that even in time of war one*

[7]We note that the common law has traditionally recognized a difference between the mere payment of money and other acts; it is settled that the sole remedy for breach of a personal service contract is monetary damages and not specific performance. See Annot., 135 A.L.R. 279 (1941).

> *may truly support and defend our institutions though he stops short of using weapons of war.* [Emphasis added.]

The statutory exemption from military service is thus limited to those whose religious scruples prevent them from doing particular personal acts—engaging in hostilities or military service. But the statutory exemption does not go to the payment of federal taxes, and taxpayers here make no claim that the payment of taxes is itself an act contrary to their religious beliefs.

All of this establishes, moreover, that taxpayers' grievance has nothing whatever to do with the income tax, but is an attack on Congress' expenditure of federal funds through separate legislation for a purpose admittedly within its constitutional authority (or at least not put in question in this case). Taxpayers' allegations simply do not set out a legal basis for holding the income tax unconstitutional on its face or as applied. See *Crowe v. Commissioner* (C.A. 8th), decided June 28, 1968 (68-2 U.S.T.C., par. 9444, p. 87,542), in which the court held *(ibid.)*:

> A taxpayer cannot, however, evade payment of his legal tax obligations on the basis of his dissatisfaction with the distribution of revenue. Congress alone is authorized to appropriate money to promote the general welfare and its determination within constitutional bounds is decisive. It is the function of the courts to interpret the statutes so as to promote and effectuate the disclosed intent of Congress. [Citations omitted.]

Only the Constitution and not taxpayers' personal disapproval can limit the authority of the Congress to appropriate funds for specific purposes.

C. Taxpayers have no standing to question the expenditure of federal funds

The Supreme Court, in *Flast v. Cohen,* decided June 10, 1968 (36 U.S. Law Week. 4601), last term reaffirmed *Frothingham v. Mellon,* 262 U.S. 447, which held that a federal taxpayer was generally without standing to challenge the constitutionality of an expenditure of federal funds. However, *Flast* decided that the principle of *Frothingham* is not applicable if a federal taxpayer alleges that a given enactment "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." (36 U.S. Law Week., p. 4607.) The taxpayers in *Flast* were found to have standing to attack the constitutionality of Titles I and II of the Elementary and Secondary Education Act of 1965, P.L. 89-10, 79 Stat. 27, by their allegation that federal funds were being spent for the benefit of religious schools (see 36 U.S. Law Week., p. 4602) because the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power" (36 U.S. Law Week., p. 4607). From *Flast,* it is seen that in addition to status as a taxpayer it is necessary to point to (1) a constitutional limitation on Congress' powers which (2) relate specifically to the taxing and spending power.

Although taxpayers here make reference to the First Amendment, unquestionably a limitation on congressional power, they point to no First Amendment principle that prohibits the expenditure of federal funds in connection with Vietnam. As previously noted, taxpayers expressly state that they make no claim that Vietnam spending is unconstitutional *per se*. Moreover, in contrast to the taxpayers in *Flast,* taxpayers here do not allege that Vietnam outlays in whole or in part are made for the benefit of religion or religious institutions contrary to the Establishment Clause, nor do they allege that such expenditures coerce them in the exercise of their religious practices. Taxpayers rely solely on the allegation that they conscientiously object to congressional support for our involvement in Vietnam, but they articulate no theory by which the First Amendment—solely because of the depth of their feeling on this issue—may be seen as a restraint on congressional action. Thus, for much the same reasons that taxpayers fail to state a proper claim for relief in connection with the operation of the income tax (as to which they do have a financial interest sufficient to establish standing), taxpayers are plainly without standing to question the constitutionality of Vietnam outlays under the *Flast* and *Frothingham* cases.

CONCLUSION

For these reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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